In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,
Petitioner,

vs.

RAY H. PAGE, WARDEN
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The basic facts from which the cause of action now before this Court springs are contained in the opinion of the Oklahoma Court of Criminal Appeals in *Barber v. State,* Okl. Cr., 388 P.2d 320 (A. 28-41), and the decision of the United States Court of Appeals, Tenth Circuit, in *Barber v. Page,* 381 P.2d 479 (A. 60-63). These reflect that the petitioner here, Jack Allen Barber, is a state prisoner who was originally

charged by information in the District Court of Tulsa County, Oklahoma, conjointly with three other defendants, with the crime of robbery with firearms.

At preliminary hearing, before severance was granted for purpose of trial, petitioner and one of his co-defendants, Charles Henry Woods, were both represented by the same retained counsel, one Ed Parks. There having apparently been a previous agreement made between the prosecution and Woods, the prosecution called Woods to testify at this hearing. After advising Woods of his right to claim the privilege against self-incrimination, Parks withdrew as attorney for this defendant and he, Woods, testified and incriminated the petitioner. Woods was not cross-examined by Parks on behalf of petitioner, but he was so cross-examined by the attorney for one of the other defendants.

At trial, a transcript of Woods' testimony at the preliminary hearing was received in evidence and read to the jury over the objection of petitioner's trial counsel, Parks. Woods was not present at this trial, he being at that time an inmate of a federal penitentiary in Texas. Petitioner was found guilty of the crime of robbery with firearms, after former conviction of a felony, and his punishment was assessed at imprisonment in the state penitentiary for a term of fifteen years.

An appeal of this conviction was taken by Parks to the Oklahoma Court of Criminal Appeals. In its opinion rendered in *Barber v. State,* supra, that Court held in that part of the opinion pertinent here (A. 31) that,

> "Where the testimony of the witness was given at the preliminary examination and taken down by the reporter in the presence of the defendant and his counsel, who cross-examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction."[1]

After proceeding into the United States District Court for the Eastern District of Oklahoma by way of petition for writ of habeas corpus and being denied relief there, the petitioner appealed that order to the United States Court of Appeals, Tenth Circuit. That Court rendered an opinion in which it remanded the matter to the District Court to determine whether a remedy in the state courts existed whereby the issue might be presented, or whether the petitioner was entitled to proceed in the federal court. See *Barber v. Page*, 355 F.2d 171.

Pursuant to the circuit court's order of remand, the District Court held an evidentiary hearing at McAlester, Oklahoma (A. 42-58), after which the court, being satisfied, that petitioner had exhausted the available state remedies, denied the writ and again granted him leave to appeal to the Circuit Court. That Court subsequently rendered an opinion in *Barber v. Page*, 381 F.2d 479, affirming the District Court's denial

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[1]The Court of Criminal Appeals cited and followed, among other cases, its decision in **Valentine v. State**, 16 Okl. Cr. 76, 194 P. 254, the pertinent syllabus of which provides: "The constitutional provision which guarantees to a defendant the right to be confronted by the witnesses against him is fully complied with when the defendant has had the opportunity to cross-examine the said witnesses in a preliminary trial before a justice of the peace. When this has been done, and upon a subsequent trial of the said cause, if it is satisfactorily proven that such witnesses have, since the former trial, died, become insane, left the state, or that their whereabouts can not with due dilligence be ascertained or are sick and unable to testify, the testimony of such witnesses given upon said former trial may be proven upon the subsequent trial."

of the writ and holding, in effect, that the accused had retained counsel at the preliminary and that counsel had an opportunity to cross-examine. Failure to exercise the right of cross-examination, the Court further held, is no ground for asserting denial of the right of confrontation (A. 62).

This Court granted certiorari in this matter on October 9, 1967 (A. 68), thereby affording the petitioner the opportunity to present the following issues for the Court's consideration.

ISSUES

Whether the petitioner was unconstitutionally denied the right to be confronted by a witness against him and the further right to have the effective assistance of counsel.

ARGUMENT

I

The Sixth Amendment's right of an accused to confront the witnesses against him is now held to be obligatory on the States by the Fourteenth Amendment, and here the State of Oklahoma complied with that obligation by the procedure employed in the trial court.

The State of Oklahoma recognizes that basic right of an accused to confront his accusors. This right is provided constitutionally by Article 2, Section 20 of the Oklahoma Constitution, which provides in relevant part:

> "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, * * * "

This right is further set out by statute in Oklahoma, specifically 22 O.S. 1961 § 13, which provides in part:

* * *

> "In criminal prosecutions the defendant is entitled:
>
> 3. To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court."

A recognition of that right of an accused is evident in the opinion of the Court of Criminal Appeals in *Barber v. State,* supra, and in the previous holdings of the court which were cited in that case, all validating the procedure of permitting the reading at trial of the testimony of a witness taken at preliminary hearing where proper showing is first made by the prosecution.

This Court has now made it unmistakably clear that the Sixth Amendment's guaranty of the right of an accused to confront the witnsses against him is made obligatory on the states by the Fourteenth Amendment. We are so advised in *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed 2d 923, 85 S. Ct. 1065. The very basic and fundamental nature of this right is perhaps best summarized in the language of the court, speaking through Mr. Justice Black, in *Pointer,* 380 U.S., at 405, 13 L. Ed. 2d, at 927:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

The trial procedure sanctioned by the Oklahoma appellate court in regard to petitioner's trial must, then, be shown to meet with federally-recognized standards relating to confrontation. The respondent submits that said procedure does in fact measure up to these standards, within the full meaning and intent of *Pointer*.

Pointer, we suggest, should be limited to the facts of that particular case. The facts there were that the state, over the defendant's objections, introduced the transcript of the testimony of the prosecuting witness given at the preliminary hearing, at which the defendant was not represented by counsel. This Court has, very probably, already so limited that decision, for it points out that the Court has recognized the admissibility against an accused of dying declarations, citing *Mattox v. United States*, 146 U.S. 140, 36 L. Ed. 917, 13 S. Ct. 50, and of testimony of a deceased witness who has testified at a former trial, citing *Mattox v. United States*, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337, *Dowdell v. United States*, 221 U.S. 325, 55 L. Ed. 753, 31 S. Ct. 590, and *Kirby v. United States*, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574. And this very significant language appears in *Pointer* in 380 U.S., at 407, 13 L. Ed. 2d, at 928:

"The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine."

In the case now before the Court, the petitioner was represented by his own retained counsel at preliminary hearing, and it is undisputed that counsel was given a full and complete opportunity to cross-examine the prosecution's witness, although he did not take advantage of this opportunity. Moreover, the opportunity was given at that type "full-fledged" hearing to which this Court referred in *Pointer*. For example, some of the pertinent Oklahoma statutes, or parts of same, relating to preliminary examinations are the following:

22 O.S. 1961 § 257

"At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him. He must, also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant."

22 O.S. 1961 § 258

"First: The witnesses must be examined in the presence of the defendant, and may be cross-examined by him. * * * "

22 O.S. 1961 § 259

"When the examination of the witnesses on the part of the State is closed, any witnesses the defendant may produce must be sworn and examined."

22 O.S. 1961 § 262

> "After hearing the proofs and the statement of the defendant, if he have one, or his testimony if he testifies if it appear either that a public offense has not been committed, or that a public offense has been committed, but there is not sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, * * * "

Thus, under Oklahoma's laws petitioner's trial counsel was provided a proper forum and a complete "opportunity" to cross-examine Woods. This is all that *Pointer* requires. It would be illogical to attempt to construe that case to mean that a witness who testifies at preliminary hearing must, in fact, be cross-examined before his testimony can be read later at trial after proper showing that the witness is unavailable to testify. This common-sense meaning of *Pointer* has been adopted by many Federal courts. See *Herrera v. Wilson,* 364 F.2d 798 (9th Cir. 1966), *Jones v. People of State of California,* 364 F.2d 522 (9th Cir. 1966), *Butler v. Wilson,* 365 F.2d 308 (9th Cir. 1966), *Golliher v. United States,* 362 F.2d 594 (8th Cir. 1966), and *Government of Virgin Islands v. Aquino,* 378 F.2d 540 (3rd Cir. 1967).

II

The right of an accused to confront the prosecution's witnesses by way of cross-examination may be, and was here, effectively waived by the decision of his counsel not to cross-examine.

As petitioner correctly notes in his brief, we are advised by this Court in *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, that "A waiver is ordinarily an intentional relinquishment of a known right." But by so holding, this Court simply laid down the reasonable rule that before a defendant can be said to have waived his right to the assistance of counsel at trial, he must know that such right exists and then knowingly and intelligently forego same. Nothing in that opinion indicates that the Court by implication intended that its holding be extended to situations dealing with tactical decisions of counsel at trial. In other words, we suggest that *Zerbst* does not alter the authority of counsel, as manager of his client's lawsuit, to make all decisions relating to strategy, even decisions waiving certain rights of his client, so long as such decisions relate to procedure rather than the merits of the case.

Somewhat closer to the case at bar is the case of *Brookhart v. Janis,* 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245. In that case the attorney for the petitioner agreed that the prosecution need only make a prima facie showing of guilt and that he would neither offer evidence for his client nor cross-examine any of the prosecution's witnesses. During the trial, the petitioner was denied the right to cross-examine any

of the witnesses who testified against him, and the prosecution was permitted to introduce as evidence against him an alleged confession made out of court by one of his co-defendants, who did not testify in court. In reversing that conviction this Court held that the petitioner neither personally waived his constitutional right to confront and cross-examine the witnesses against him, nor did he acquiesce in his attorney's attempted waiver. It is evident, however, that what that opinion really turned on was the fact, as stated by the Court in 384 U.S., at 7, 16 L. Ed. 2d, at 318, that "petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea * *." Again, counsel, through his own independent decision, cannot bind his client by waiving a right which in effect decides his case on its merits.

This same question of waiver was before a Federal court in *Wilson v. Gray,* 345 F.2d 282 (9th Cir. 1965). There the Court held that the right of an accused to cross-examine prosecution witnesses was effectively waived by the action of his counsel in stipulating, in the presence of the accused, to trial without a jury on the transcript of the preliminary hearing. It was the thinking of that Court that such waiver amounted to counsel's exercise of trial strategy and tactics. Much of the reasoning and supporting authorities employed by the Court in *Wilson* will be adopted by the respondent here.

In *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 837, 83 S. Ct. 822, this Court set down guidelines for determining whether

there has been an effective waiver of a federal constitutional right. The following pertinent language of the Court may be found in 372 U.S., at 439, 9 L. Ed. 2d, at 869:

> "The classic definition of waiver enunciated in Johnson v. Zerbst, (citation)— 'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. * * * At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * *A choice made by counsel not participated in by the petitioner does not automatically bar relief.*" (Emphasis added)

The Circuit Court in this *Wilson* case reasoned that "Implicit in this statement (the language emphasized above) is the notion that in the proper circumstances counsel for the accused may effectively waive certain rights of the accused during the course of his representation of the accused and as a matter of trial strategy or tactics."

This Court later clearly stated its position in regard to the effect of such waiver by counsel of certain rights of the accused. In the case of *Henry v. Mississippi,* 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564, the Court reversed conviction

and remanded the matter to the Mississippi Supreme Court in order that an evidentiary hearing could be conducted to determine whether the petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies. See this language in 379 U.S., at 451, 13 L. Ed. 2d, at 415:

> "If either (tactical) reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom, 333 F.2d 496 (CA 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

Moreover, again relying on the reasoning of the Circuit Court in *Wilson v. Gray*, supra, respondent submits that the wisdom and propriety of permitting counsel in the proper circumstances to effectively waive certain rights of the accused as a matter of trial strategy or tactics is suggested by sound reasoning as well as authority. This Court, in enlarging the scope of the guarantee of the right to counsel contained in the Sixth Amendment, has based such enlargement on the grounds stated in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

Note this language in the *Wilson* opinion, as the Court comments on what to it is the significance of that part of this Court's decision in *Powell* quoted above:

"We are in hearty agreement with these views. And we think that it inevitably flows from them that, when a defendant has counsel it is counsel's decision such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there."

That is precisely what is involved here. Petitioner could not be expected to know the intricacies of preliminary hearing and the possible ramifications arising from same. He could not be expected to know that under Oklahoma law certain situations might arise wherein a prosecution witness might be later unavailable to be cross-examined at trial and that for this reason the witness should be cross-examined at preliminary hearing. It can be reasonably inferred that this is the reason he retained Mr. Parks, an experienced lawyer, and relied on his judgment in such matters. Parks exercised his judgment and, we submit, petitioner should be bound by its consequences, just as he would have been the beneficiary had his counsel's decision turned out to his advantage.

III

Petitioner had the effective assistance of counsel, notwithstanding the fact that his counsel elected not to cross-examine the prosecution's witness at preliminary hearing.

This proposition is somewhat related to the previous proposition under which the respondent submitted that counsel for an accused, by the very nature of his capacity as manager of the lawsuit, must be given decision-making authority which is binding on his client. Moreover, again as suggested previously, the right to effective representation does not mean that such representation must be flawless to be effective. Decisions of counsel which later backfire are not sufficient foundation upon

which to rest an assertion that an accused was denied the right to counsel guaranteed by the Constitution. It has been well stated in the case of *Johnson v. United States,* 380 F.2d 810 (10th Cir. 1967), that,

> "Little need be said about the claimed ineffective assistance of counsel. The counsel was retained, was a lawyer of some years of trial experience and specialized in the field of criminal law. All of the matters pointed out here to support this point pertain to trial procedures and each requires the exercise of judgment on the part of the trial counsel. In every case a lawyer loses, it is possible, in retrospect, to say that some different strategy or procedure might have brought about a better result. But this is not sufficient to sustain a claim of ineffective assistance of counsel. * * * Success is not the test of effective assistance of counsel."

This case is distinguishable from this Court's decision in the case of *Glasser v. United States,* 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. There the defendant Glasser had retained his own counsel, but the trial court, over the defendant's objections, appointed this same attorney to represent another alleged co-conspirator to the same crime for which Glasser was charged. Glasser argued unsuccessfully to the court that there was a possibility of a conflict of interest between the two representations. This Court, in setting aside Glasser's conviction, held that counsel's representation of Glasser was not as effective as it might have been had the appointment to represent the other co-defendant not been made.

That is not this case. Here Parks was retained separately by petitioner and all of his co-defendants. There is nothing in this record to indicate that petitioner was of the opinion that

Parks' representation of the others would conflict with his own case. It should be noted in this regard that, unlike the *Glasser* case in which all the defendants were tried together under one indictment, in the case at bar, pursuant to Oklahoma law[2], severances were obtained and petitioner was tried alone. There was no conflict of interest between Parks' representation of petitioner and his representation of Woods. When Parks requested and was granted permission by the trial court to withdraw as counsel for Woods, then his full allegiance was to petitioner and he could have vigorously cross-examined Woods to the same extent as he would a witness with whom he was completely unacquainted.

It was the contention of petitioner in the Circuit Court, as he implies in that portion of his brief to which this proposition is directed, that petitioner's trial counsel was in a doubtful position because of his previous representation of Woods. Such "ethical considerations" (*Barber v. Page,* 381 F.2d, at 481) seemingly spring from the idea that Parks was restrained in possible cross-examination of Woods by the fact that he possessed certain confidential information that he gained through their previous attorney-client relationship. It is, of course, a long-established rule of the common law, embodied in many states by statute, that an attorney, counselor, or solicitor is not permitted, and cannot be compelled, to testify as to communicaions made to him in his professional character by

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[2] 22 O.S. 1961 § 838 provides: "When two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly in the discretion of the court."

his client. But in the absence of a contrary statute, the right to prohibit the disclosure of such communications belongs to the client and not to the attorney, and therefore the client may renounce or waive it at his pleasure.[3]

Assuming the cross-examination of Woods by Parks might have amounted to disclosure by the latter of communications between himself and his former client, we submit that such would have been permissible under the circumstances of this case, for the general rule has been recognized by this Court that where a party takes the stand and testifies to communications with his counsel, he thereby waives the privileged character of such communications. In the early case of *Hunt v. Blackburn,* 128 U.S. 464, 32 L. Ed. 488, 9 S. Ct. 125, this Court stated:

> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets. And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."

Circuit Courts have followed this Court's decision in *Hunt* in the cases of *Steen v. First Nat. Bank,* 298 F. 36 (8th Cir. 1924), *Cooper v. United States,* 5 F.2d 824 (6th Cir. 1925),

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[3] See 58 Am. Jur., Witnesses, §§ 460, 522.

and *Fransworth v. Sanford,* 115 F.2d 375 (5th Cir. 1940), cert. den. 313 U.S. 586, 85 L. Ed. 1941, 61 S. Ct. 1109, reh. den. 314 U.S. 708, 86 L. Ed. 565, 62 S. Ct. 54.

Oklahoma is in accord with that general rule. Any thoughts that Parks might have entertained about whether his cross-examination of Woods might be restricted by virtue of his previous relationship to this subject would have been removed by an examination of the decisions of the Oklahoma courts construing the statute relating to privileged communications.* All of the pertinent decisions of the said courts hold, in effect, that where a client takes the witness stand and testifies as to communications made by him to his attorney, such action entirely removes the bond of secrecy provided by law as to such communications. See *Tiger v. Lozier,* 124 Okl. 260, 256 P. 727 cert. den. 275 U.S. 496, 72 L. Ed. 392, 48 S. Ct. 117, *Boring v. Harber,* 130 Okl. 251, 267 P. 252, and *Brown v. State,* 9 Okl. Cr. 382, 132 P. 359.

If the waiver rule makes it permissible for the attorney to testify as to prior communications with the client after the client so testifies, then certainly it is reasonable to assume that the rule would be applicable to cross-examination by such lawyer of his former client after the client reveals the contents of such previous communications. The very reason for the rule ceases to exist where, as here, the client chooses to testify and

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* 12 O.S. 1961 § 385 provides in relevant part: "The following persons shall be incompetent to testify: * * * 4. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent."

make certain self-incriminating statements which also incriminate his co-defendants. By so testifying, Woods removed the veil of secrecy from the ultimate bit of information that he could possibly have previously related to Parks; that is, that he, along with his co-defendants, committed the crime in question. Therefore, if Parks was ineffective at preliminary hearing, it was because he chose to be ineffective, and this decision, we submit, is binding upon the petitioner.

IV

There are exceptions to the constitutional guarantee of confrontation of witnesses, and in this case adequate foundation was laid to support the introduction of the transcript of testimony at preliminary hearing as a substitute for the appearance of this witness in person.

Under the first proposition of this brief, it has been submitted that this Court's decision in *Pointer v. Texas* is itself sufficient authority for our contention that the right of confronation is not a rigid, inflexible and absolute right, so that point need not here be further belabored. There remains the question of whether, under the facts of this case, the trial court was justified in ruling that it had been sufficiently demonstrated that the prosecution's witness was unavailable, so that his testimony might be introduced by reading to the jury the transcript of his testimony at preliminary hearing.

This Court in the *Pointer* case did not have to reach the question of whether the prosecution made sufficient showing that the witness was unavailable and that the trial court should

therefore permit his testimony to be read. The only evidence put on in this regard was that the witness had moved to California and did not intend to return to Texas. The reasonable deduction could be made, however, that the Court was of the opinion that this was an adequate showing, since it indicated that there would likely have been a different result had the defendant been represented at preliminary hearing by counsel who had been given an opportunity to cross-examine the witness. Thus it would appear that the Circuit Court in the case of *Government of the Virgin Islands v. Aquino*, 378 F.2d 540 (3rd Cir. 1967), which is relied on by petitioner in his brief, has gone further even than this Court has gone where the facts show that the witness is outside the state and therefore outside the trial court's subpoena jurisdiction. In *Aquino* the Court sets out rules which place on the prosecution the duty, where the witness is outside the state but his whereabouts are known, to present proof that an attempt was made to secure such witness's voluntary attendance. The Court further suggests that the prosecution has the duty to show, where the witness will not appear voluntarily, that it has attempted to make use of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, if the states involved have adopted that Act.

In the case at bar, however, not only was the subject Woods outside the State of Oklahoma at the time this petitioner came on for trial, but he was additionally incarcerated in a Federal penitentiary. It is stated in petitioner's brief that

"Cooperation between state and federal law enforcement officials is common knowledge." This language is apparently intended to suggest that perhaps the prosecutor for Tulsa County, Oklahoma might have been successful in requesting some type of arrangement whereby Woods could have been released temporarily from the Federal penitentiary in Texas and brought to Tulsa for the purpose of testifying at petitioners' trial.

It seems quite significant that the Federal statutes relating to prisons and prisoners, 18 U.S.C. § 4001, et seq., furnish no authority for such suggestion. To the contrary, the only reference in the statutes to transfers of Federal prisoners is in Sections 4082 and 4085. The former authorizes the Attorney General of the United States, in whom the control and management of Federal penal and correctional institutions is vested, to designate the places of confinement of Federal prisoners and at any time to transfer such prisoners from one place of confinement to another. The latter section empowers the Attorney General, when he finds it in the public interest to do so and when requested to do so by the Governor of a State, to cause Federal prisoners, prior to their release, to be transferred to a State penal institution, where such prisoners have been indicted, informed against or convicted of a felony in a court of record of any State. It is by authority of these statutes that the United States Government, through its Attorney General, frequently releases Federal prisoners to State officials for service of State sentences, without loss of Federal jurisdiction to again claim such prisoners for service of the

remainder of their Federal sentences. See *Lipscomb v. Stevens,* 349 F.2d 997 (6th Cir. 1965), cert. den. 382 U.S. 993, 15 L.Ed.2d 479, 86 S. Ct. 573, and *Murray v. United States,* 334 F.2d 616 (9th Cir. 1964), cert. den. 380 U.S. 917, 13 L.Ed.2d 802, 85, S. Ct. 906. We are referred to no such statutory or case authority, nor are we aware of any, for the release of a Federal prisoner to State officials for the purpose of having such prisoner testify in the trial of another accused.

The respondent submits that the State prosecutor sustained his burden of establishing sufficient foundation for the necessity of reading Woods' testimony from the preliminary hearing by showing to the satisfaction of the trial court that Woods was indeed unavailable, in that he was confined in a Federal penitentiary outside the State of Oklahoma.

CONCLUSION

Notwithstanding the undisputed right of an accused, under the Sixth Amendment's guaranty, to confront witnesses against him, it has been demonstrated by this Court that this is not an absolute and inflexible right to confront such witnesses face to face at trial. It has been well stated by the Court in the early case of *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409, 15 S. Ct. 337, to which the Court refers in *Pointer v. Texas,* supra, that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of

public policy and the necessities of the case", and further that "The law, in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." This Court has further demonstrated that it is of the opinion that the constitutional guaranty of confrontation is limited to the assurance of the right of cross-examination of a witness, by counsel on behalf of the accused, before the testimony of such witness may be later used against the accused at trial. This assumes, of course, that the prosecution first makes sufficient showing of the unavailability of the witness who has previously testified.

In the case at bar, respondent submits, the witness Woods was in fact unavailable, but he had previously been on the witness stand at the petitioner's preliminary hearing, at which time counsel who had been retained by petitioner had a complete and adequate opportunity to cross-examine him. Counsel elected not to exercise the right afforded him at that time and, since he was manager of his client's lawsuit, this decision was binding upon his client, who now complains. Under these facts, an exception was properly applied by the trial court to the constitutional right of the petitioner to be confronted by this witness at trial.

The respondent prays, therefore, that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit denying the writ of habeas corpus.

Respectfully submitted,

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